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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

WILLAMETTE RIVERKEEPER et al.,

Plaintiffs,

vs.

NATIONAL MARINE FISHERIES SERVICE
et al.,

Defendants,

and

OREGON DEP'T OF FISH AND WILDLIFE,

Defendant-Intervenor.

Case No.: 6:21-cv-34-AA

**AMENDED COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

(Violations of Endangered Species Act,
16 U.S.C. §§ 1531 *et seq.*, and the
National Environmental Policy Act, 42
U.S.C. §§ 4321 *et seq.*)

1. This is a civil suit for declaratory and injunctive relief to challenge federal agency actions related to winter steelhead trout in the upper Willamette River in Oregon. Winter steelhead are listed under the Endangered Species Act (“ESA”) as threatened with extinction. Since winter steelhead were listed under the ESA, populations have declined even further. Plaintiffs Willamette Riverkeeper and The Conservation Angler seek to compel Defendants National Marine Fisheries Service (“NMFS”), U.S. Army Corps of Engineers (“Corps of Engineers”), and U.S. Fish and Wildlife Service (“Fish and Wildlife Service”) to comply fully with the ESA and the National Environmental Policy Act (“NEPA”) to ensure winter steelhead survive and recover in their native habitat.

2. The Corps of Engineers and Fish and Wildlife Service have exercised their discretion and funded or facilitated the production and release of hatchery summer steelhead into winter steelhead habitat, which has jeopardized the continued existence of winter steelhead and destroyed and adversely modified their critical habitat. In turn, NMFS evaluated the effects on winter steelhead of adopting a Hatchery and Genetic Management Plan (“HGMP”) for hatchery summer steelhead, and issued an unlawful Biological Opinion (“BiOp”) finding that the program does not jeopardize the continued existence of winter steelhead or destroy or adversely modify their critical habitat. NMFS also violated ESA regulations when it approved the hatchery summer steelhead HGMP. Finally, NMFS violated the National Environmental Policy Act (“NEPA”) when it issued an unlawful Environmental Impact Statement (“EIS”) and Record of Decision (“ROD”) to approve the hatchery summer steelhead program.

Jurisdiction.

3. An actual, justiciable controversy exists between the parties.

4. This Court has jurisdiction to resolve claims against NMFS pursuant to 28 U.S.C. § 1131. This Court has jurisdiction to resolve claims against the Corps of Engineers and Fish and Wildlife Service pursuant to 28 U.S.C. § 1131 and 16 U.S.C. § 1540(g)(1). Pursuant to the citizen suit provision of the ESA, more than 60 days ago, Plaintiffs served the Corps of Engineers and the Fish and Wildlife Service with written notice of their intent to sue for claims properly brought pursuant to the citizens suit provision. 16 U.S.C. § 1540(g)(2). Neither the

Corps of Engineers or the Fish and Wildlife Service has remedied violations of the ESA, which are ongoing and likely to continue.

5. The BiOp is final agency action subject to judicial review under the APA. 5 U.S.C. §§ 704, 702; *Bennett v. Spear*, 520 U.S. 176, 178 (1997). The injunctive relief Plaintiffs seek is proper under 16 U.S.C. § 1540(g)(1)(A), 28 U.S.C. § 1651(a), 28 U.S.C. §§ 2201–02, and 5 U.S.C. §§ 701–06.

6. Venue is proper in this Court under 16 U.S.C. § 1540(g)(3)(A), 28 U.S.C. § 1391, and Local Rule (“LR”) 3-2(3), because the South Santiam Hatchery and other facilities or activities owned or financed by the Corps of Engineers and/or the Fish and Wildlife Service are located in Linn County. Hatchery summer steelhead produced and released into the South Santiam River exist in Linn County. The Minto Fish Facility and other facilities or activities owned or financed by the Corps of Engineers and/or the Fish and Wildlife Service are located in Marion County. Hatchery summer steelhead released into the North Santiam River exist in Marion County. A substantial part of the events or omissions giving rise to the claims herein occurred within Linn County and Marion County. Agency records and/or personnel are located in Linn County and Marion County.

Parties.

7. Plaintiff Willamette Riverkeeper is a non-profit organization founded in 1996, and focuses on protecting and restoring the resources of the Willamette River basin in Oregon. Willamette Riverkeeper works on programs and projects ranging from Clean Water Act compliance and river education, to Superfund cleanup and restoring habitat. Willamette Riverkeeper filed suit to force the Corps of Engineers and other federal action agencies to consult with NMFS as to the effects of federal projects and facilities on ESA-listed fish in the upper Willamette River basin, including winter steelhead trout. That consultation resulted in a 2008 Biological Opinion related to effects of federal facilities and projects on winter steelhead trout and spring Chinook salmon in the upper Willamette River basin.

8. Plaintiff The Conservation Angler Conservation Angler is non-profit conservation group that advocates for wild fish and fisheries, and advocates to protect and conserve wild steelhead,

salmon, trout and char throughout their Pacific range. The Conservation Angler is a watch-dog organization - holding public agencies, countries and nations accountable for protecting and conserving wild fish for present and future generations - using education, legal, administrative and political means necessary to prevent the extinction and to foster a long-term recovery of wild steelhead trout, salmon, and char to fishable and ultimately, harvestable abundance.

9. Plaintiffs Willamette Riverkeeper and Conservation Angler have suffered and continue to suffer harm from Defendants' violations of the ESA and NEPA. Plaintiffs' members include anglers who enjoy fishing, and would seek and enjoy catch and release fishing of populations of winter steelhead trout in the North Santiam River and South Santiam River basins, if the populations were recovered. Plaintiffs' members include anglers and others with scientific and professional interests in the genetic integrity of winter steelhead trout. Plaintiffs' members include anglers who are outfitters or guides who seek to advance commercial interests in what could be a winter steelhead trout fishery in the North Santiam River and South Santiam River basins.

10. Defendant NMFS is an agency of the U.S. Department of Commerce. NMFS is responsible for the survival and recovery of certain aquatic species listed under the ESA, including winter steelhead in the upper Willamette River basin. NMFS must also comply with NEPA.

11. Defendant Barry Thom is the Regional Administrator of NMFS. He is sued in his official capacity. Mr. Thom is responsible for actions or decisions alleged herein.

12. Defendant Corps of Engineers is an agency of the U.S. Department of the Army. The Corps of Engineers built and operates federal dams and other facilities in the North Santiam River and South Santiam River basins. The Corps of Engineers built fish hatcheries in the North Santiam and South Santiam River basins. The Corps of Engineers funds, facilitates, or otherwise authorizes the production and release of hatchery summer steelhead that jeopardize winter steelhead in the upper Willamette River basin.

13. Defendant Michael Helton is the District Engineer for the Corps of Engineers. Mr. Helton is sued in his official capacity. Mr. Helton is responsible for actions or decisions alleged herein.

14. Defendant Fish and Wildlife Service is an agency within the U.S Department of the Interior. The Fish and Wildlife Service must comply with the ESA. The Fish and Wildlife Service has funded aspects of the hatchery summer steelhead program.

15. Defendant Robyn Thorson is the Regional Director of the Fish and Wildlife Service. Ms. Thorson is sued in her official capacity. Ms. Thorson is responsible for actions or decisions alleged herein.

Allegations.

16. The Willamette River originates in the Cascade Mountains in Oregon and flows generally northward to its confluence with the Columbia River. The mainstem Willamette River is 187 miles long. At river mile 27, the Willamette River falls approximately 35 feet. By volume of water, Willamette Falls is the largest in Oregon, and the sixth largest in the United States. Historically, in its natural state, Willamette Falls was a barrier to the upstream migration of anadromous fish, except during relatively high flows in the winter or early spring. Historically, steelhead trout (*Oncorhynchus mykiss*) and Chinook salmon (*Oncorhynchus tshawytscha*) were able to ascend Willamette Falls to reach the Willamette River basin above the falls. The part of the Willamette River basin above Willamette Falls is called the “upper” Willamette River.

17. The North Santiam River originates near Three Fingered Jack in the Cascade Mountains and flows roughly 92 miles to its confluence with the South Santiam River. The Corps of Engineers built Big Cliff Dam and Detroit Dam on the North Santiam River. Big Cliff Dam is downstream of Detroit Dam, and is a barrier to the upstream volitional migration of winter steelhead.

18. The South Santiam River originates at the confluence of Sevenmile and Squaw Creeks in the Cascade Mountains and flows roughly 66 miles to its confluence with the North Santiam River. The Corps of Engineers built Foster Dam on the South Santiam River. Foster Dam is a barrier to the volitional upstream migration of winter steelhead.

19. The North Santiam River and South Santiam River join to form the Santiam River, which flows roughly 10 miles to its confluence with the Willamette River upstream of Willamette Falls.

20. Winter steelhead in the upper Willamette River basin are usually dark-olive in color, shading to silvery-white on the underside, with a speckled body and a pink to red stripe running along the sides. Life histories of individual winter steelhead are diverse. Winter steelhead eggs generally develop in gravels for up to four months—from April through July. Peak emergence for juvenile winter steelhead is in July. After emerging, juvenile winter steelhead rear in freshwater generally for two years before migrating to the ocean. Some winter steelhead rear in freshwater for up to seven years. Some winter steelhead may forgo anadromy and residualize. Winter steelhead that migrate to the ocean and back develop a slimmer profile, become more silvery in color, and typically grow larger than those that residualize.

21. The majority of adult winter steelhead in the Upper Willamette River return to freshwater in January through April. Most adult winter steelhead pass Willamette Falls from early February through early April. Most adult winter steelhead spawn in April and May. Winter steelhead spawn in both mainstem rivers and tributaries. Some steelhead are iteroparous. Subyearling winter steelhead emerge from gravels typically between 25 and 70 days after spawning. Emergence depends on stream temperatures. Winter steelhead fry generally emerge in July.

22. Four independent populations of winter steelhead exist upstream of Willamette Falls: in the Mollala, North Santiam, South Santiam, and Calapooia Rivers. Between 1980 and 1990, roughly 10,000 adult winter steelhead returned each year to Willamette Falls.

23. In 1938, Congress enacted the Flood Control Act of 1938, which authorizes the Corps of Engineers to build dams, reservoirs, and related projects in the Willamette River basin. The Willamette Valley Project is comprised of 13 dams in the Willamette River basin constructed, operated, and maintained by the Corps of Engineers. The Willamette Valley Project includes dams on the North and South Santiam Rivers. The dams on the North and South Santiam Rivers block winter steelhead from access to roughly one-third of historic habitat.

24. After parts of the Willamette Valley Project were built, beginning in 1965, hatchery winter steelhead were released into some streams in the upper Willamette River basin. These fish were a mix of native and out-of-basin stocks, and returned in early winter. These fish are currently found in some streams on the west side of the Willamette Valley. Winter steelhead

occupying the westside rivers are genetically distinct from those occupying the eastside rivers. The winter steelhead hatchery program ended in 1999.

25. Historically, there were no summer steelhead in the upper Willamette River basin. In 1966, the Oregon Department of Fish and Wildlife (“ODFW”) introduced hatchery summer steelhead into the upper Willamette River basin. ODFW introduced hatchery summer steelhead from the Skamania Hatchery on the Washougal River in Washington.

26. Hatchery summer steelhead are released as yearlings. Yearlings are roughly one year-old. Hatchery summer steelhead exhibit life histories similar to winter steelhead. Some hatchery summer steelhead juveniles residualize. Hatchery summer steelhead that emigrate to the ocean generally return to freshwater in two years. Most hatchery summer steelhead that return cross Willamette Falls in June. Returning hatchery summer steelhead reach the Santiam River basin from June through August. Some hatchery summer steelhead return to traps at fish collection facilities. Some hatchery summer steelhead are caught by anglers. Some hatchery summer steelhead spawn with each other. Some hatchery summer steelhead spawn with winter steelhead. Some hatchery summer steelhead are iteroparous.

27. On March 25, 1999, NMFS listed winter steelhead in the upper Willamette River "evolutionarily significant unit" (“ESU”) as threatened with extinction under the ESA. 64 Fed. Reg. 14517 (March 25, 1999). The ESU comprises the upper Willamette River basin south to the Calapooia River, inclusive. In 2006, NMFS listed or re-listed under the ESA ten "distinct population segments" (“DPSs”) of West Coast steelhead, including in the upper Willamette River. 71 Fed. Reg. 834, 860 (Jan. 5, 2006). Winter steelhead listed under the ESA occupy each of four subbasins: the Mollala, North Santiam, South Santiam, and Calapooia Rivers. Each of these river basins has its own distinct population of winter steelhead. Among the four populations, most (70%) winter steelhead return to the Santiam River basin.

28. Winter steelhead have been found in the upper Willamette River upstream from its confluence with the Calapooia River. Winter steelhead have been found in the McKenzie River. Winter steelhead have been found in Fall Creek, a tributary to the Middle Fork Willamette River.

29. In 2007, the Corps of Engineers and other federal agencies consulted with NMFS to

obtain its opinion as to effects of the Willamette Project—including fish hatcheries—on winter steelhead and spring Chinook salmon. In 2008, NMFS issued a BiOp finding that the Willamette Project jeopardizes the continued existence of winter steelhead and spring Chinook. NMFS proposed a reasonable and prudent alternative to avoid jeopardy. The alternative provides the Corps of Engineers will implement HGMPs for hatchery summer steelhead and other hatchery fish after NMFS approves of the HGMPs.

30. In June, 2018, the Corps of Engineers and ODFW submitted to NMFS a proposed hatchery summer steelhead HGMP. The hatchery summer steelhead HGMP proposes to release 121,000 summer steelhead annually into both the North and South Santiam Rivers for a temporary period. The goal is to have 14,880 adult hatchery summer steelhead return to the upper Willamette River basin to be available for fishing, and enough entering fish traps to use as broodstock.

31. On May 17, 2019, NMFS issued a BiOp to evaluate the proposed hatchery summer steelhead HGMP and other HGMPs. NMFS also prepared an EIS under NEPA to consider alternatives to approving the hatchery summer steelhead HGMP and other HGMPs. On May 21, 2019, NMFS issued a ROD to approve the hatchery summer steelhead HGMP and other HGMPs.

32. There are four fish counting stations for steelhead returning to the Santiam River basin. The four fish counting stations are at Willamette Falls, at the Bennett Dams and Minto Fish Facility on the North Santiam, and the Foster Fish Facility on the South Santiam.

33. Hatchery summer steelhead are produced at the South Santiam Hatchery on the South Santiam River. Hatchery summer steelhead are released from the South Santiam Hatchery into the South Santiam River. The Corps of Engineers owns the land on which the South Santiam Hatchery was built. The Corps of Engineers owns buildings or facilities within the South Santiam Hatchery. The Corps of Engineers has discretion whether to allow use of its land, buildings, or facilities at the South Santiam Hatchery. The Corps of Engineers has executed licenses, special use permits or other instruments that allow ODFW to use land, buildings or facilities, or conduct operations, at the South Santiam Hatchery.

34. The Foster Fish Facility is across the South Santiam River from the South Santiam Hatchery. The Corps of Engineers funded construction of the Foster Fish Facility. The Corps of Engineers owns the Foster Fish Facility. The Corps of Engineers has discretion whether to allow use of or operations at the Foster Fish Facility. The Corps of Engineers has executed licenses, special use permits, or other instruments that allow ODFW to use or conduct operations at the Foster Fish Facility. The Corps of Engineers enables or facilitates winter steelhead collected at the Foster Fish Facility to be transported to habitat above Foster Dam.

35. Some hatchery summer steelhead produced at the South Santiam Hatchery are transferred to the Minto Fish Facility for acclimation to water from the North Santiam River. Some hatchery summer steelhead produced at the South Santiam Hatchery are transferred to the Minto Fish Facility for release into the North Santiam River. Adult hatchery summer steelhead are collected at the Minto Fish Facility on the North Santiam River. The Corps of Engineers owns the land on which the Minto Fish Facility was built. The Corps of Engineers owns buildings or facilities at the Minto Fish Facility. The Corps of Engineers holds a water right for water used at the Minto Fish Facility. The Corps of Engineers has discretion whether to allow use of or operations at the Minto Fish Facility. The Corps of Engineers has entered into contracts, leases, special use permits, or other instruments to allow ODFW to use facilities, or conduct operations at, the Minto Fish Facility.

36. The Fish and Wildlife Service administers the Sport Fish Restoration Act. The Fish and Wildlife Service has discretion whether to fund the hatchery summer steelhead program. The Fish and Wildlife Service funds the hatchery summer steelhead program. The Fish and Wildlife Service funds the hatchery summer steelhead program under the Sport Fish Restoration Act. Hatchery summer steelhead funded under the Sport Fish Restoration Act are produced in the Santiam River basin. Hatchery summer steelhead funded under the Sport Fish Restoration Act are released into the South Santiam River. Hatchery summer steelhead funded under the Sport Fish Restoration Act are released into the North Santiam River. Hatchery summer steelhead funded under the Sport Fish Restoration Act return to the South Santiam River. Hatchery

summer steelhead funded under the Sport Fish Restoration Act return to the North Santiam River.

37. ODFW authorizes and licenses fishing for hatchery summer steelhead in the upper Willamette River basin. The hatchery summer steelhead fishery begins in March and extends through December. The peak of the hatchery summer steelhead fishery is in July. Adult winter steelhead are present in the South Santiam River when ODFW authorizes fishing for hatchery summer steelhead in the South Santiam River. Adult winter steelhead are present in the North Santiam River when ODFW authorizes fishing for hatchery summer steelhead in the North Santiam River. Juvenile winter steelhead are present in the South Santiam River when ODFW authorizes fishing for hatchery summer steelhead in the South Santiam River. Juvenile winter steelhead are present in the North Santiam River when ODFW authorizes fishing for hatchery summer steelhead in the North Santiam River. If caught by an angler, juvenile winter steelhead may experience higher mortality rates than adult winter steelhead. Juvenile winter steelhead may swallow a fishing hook.

38. ODFW authorizes fishing for “wild steelhead” in the North Santiam River from July 1 to August 31. ODFW authorizes fishing for “wild steelhead” in the South Santiam River from July 1 to August 31. Anglers identify “wild steelhead” as steelhead that do not have a clipped or marked adipose fin. Winter steelhead are caught and kept under the allowance to catch and keep “wild steelhead.”

39. ODFW authorizes anglers to use barbed hooks to fish for hatchery summer steelhead. ODFW authorizes anglers to use bait to fish for hatchery summer steelhead. Barbed hooks can result in injury or mortality to a hooked fish. The use of bait can result in injury or mortality to a hooked fish.

40. ODFW has “recycled” adult hatchery summer steelhead that returned to fish traps. ODFW has recycled adult hatchery summer steelhead to enhance fishing opportunities for summer steelhead. From 2012 to 2014, ODFW recycled into the South Santiam River between 2,651 and 3,901 hatchery summer steelhead annually. In 2019, ODFW recycled hatchery summer steelhead back into the South Santiam River. In 2019, ODFW recycled back into the

North Santiam River adult hatchery summer steelhead that returned to the Minto Fish Facility. In 2020, ODFW recycled hatchery summer steelhead back into the South Santiam River. In 2020, ODFW recycled hatchery summer steelhead back into the North Santiam River.

41. Unclipped steelhead that return to the Foster Fish Facility are transported above the dam. Unclipped steelhead return to the river near the Foster Fish Facility and do not enter the fish trap, and spawn immediately below Foster Dam. Hatchery summer steelhead are more numerous than winter steelhead in the habitat immediately below Foster Dam.

42. Water temperatures affect winter steelhead. Dissolved oxygen in water affects winter steelhead. The State of Oregon has designated the North Santiam River as “water quality limited” under the Clean Water Act for the parameters of temperature and dissolved oxygen. The State of Oregon has designated the South Santiam River as “water quality limited” under the Clean Water Act for the parameters of temperature and dissolved oxygen. Stout Creek in the North Santiam River basin is impaired due to high temperatures. Thomas Creek in the South Santiam River basin is impaired due to high temperatures. Hamilton Creek in the South Santiam River basin is impaired due to high temperatures. Hamilton Creek in the South Santiam River basin is impaired due to lack of dissolved oxygen.

43. Hatchery summer steelhead released into the Santiam River basin compete with winter steelhead. Hatchery summer steelhead released into the Santiam River basin prey on winter steelhead. Hatchery summer steelhead released into the Santiam River basin displace winter steelhead from habitat. Hatchery summer steelhead released into the Santiam River basin interbreed with winter steelhead, degrading their genetic fitness. Fishing for hatchery summer steelhead in the Santiam River basin results in harm or death to winter steelhead. Hatchery summer steelhead released into the Santiam River basin jeopardize the continued existence of winter steelhead, impede the species’ recovery, and destroy or adversely modify the species’ critical habitat.

Claims for Relief: ESA.

44. Plaintiffs re-allege the allegations above.

45. Under Section 7 of the ESA, the Corps of Engineers and the Fish and Wildlife Service shall insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the species' critical habitat. 16 U.S.C. § 1536(a)(2). The Corps of Engineers and the Fish and Wildlife Service have authorized, funded, or carried out aspects of the hatchery summer steelhead program, which has jeopardized the continued existence of winter steelhead and resulted in the destruction and adverse modification of its critical habitat.

Claims for Relief: APA.

46. Plaintiffs re-allege the allegations above.

47. Under Section 7 of the ESA, NMFS may issue an opinion whether federal agency action may jeopardize the continued existence of a listed species or adversely modify or destroy its critical habitat. 16 U.S.C. §§ 1536(a)(2), (b). NMFS issued a BiOp that unlawfully finds or determines that the hatchery summer steelhead program does not jeopardize winter steelhead or result in the destruction or adverse modification of its critical habitat.

48. Under Section 7 of the ESA, NMFS may issue an incidental take statement that specifies the impact of such incidental taking on winter steelhead and reasonable and prudent measures necessary or appropriate to minimize such impact. 16 U.S.C. § 1536(b)(4)(C). NMFS issued an incidental take statement that fails to include reasonable and prudent measures necessary or appropriate to minimize such impact.

49. To be lawfully approved, the hatchery summer steelhead HGMP must evaluate, minimize, and account for the program's genetic and ecological effects on winter steelhead, including competition, predation, and genetic introgression. 50 C.F.R. § 223.203(i)(E). The hatchery summer steelhead HGMP does not evaluate, minimize, or account for the genetic or ecological effects of summer steelhead on winter steelhead. On these bases, NMFS's decision to approve the hatchery summer steelhead HGMP is unlawful.

50. To be lawfully approved, the hatchery summer steelhead HGMP must describe interrelationships and interdependencies with fisheries management. 50 C.F.R. § 223.203(i)(F). The combination of the hatchery summer steelhead program and harvest management must be

designed to provide as many benefits and as few biological risks as possible for winter steelhead.

Id. The hatchery summer steelhead HGMP is not designed to provide as many benefits and as few biological risks as possible for winter steelhead. On these bases, NMFS's decision to approve the hatchery summer steelhead HGMP is unlawful.

Claims for Relief: NEPA.

51. Plaintiffs re-allege the allegations above.

52. The EIS fails to include information of a "high quality," and "[a]ccurate scientific analysis." 40 C.F.R. § 1500.1(b). The EIS fails to take a "hard look" at the consequences and effects on winter steelhead caused by the hatchery summer steelhead program.

53. The ROD is unlawful because it is based on a deficient EIS.

Relief Requested.

Plaintiffs respectfully request that the Court grant the following relief:

1. Issue a declaratory judgment that the Corps of Engineers and the Fish and Wildlife Service violated the ESA by undertaking actions that jeopardize the continued existence of winter steelhead and destroy or adversely modify its critical habitat;
2. Issue a declaratory judgment that NMFS violated the ESA by issuing an unlawful BiOp as to the hatchery summer steelhead program;
3. Issue a declaratory judgment that NMFS violated the ESA when it approved the hatchery summer steelhead HGMP;
4. Issue a declaratory judgment that NMFS violated NEPA when it issued an EIS and ROD to evaluate the environmental effects of, and to approve, the hatchery summer steelhead HGMP;
5. Vacate the BiOp and Record of Decision, as to the hatchery summer steelhead program;
6. Order the cessation of releases of hatchery summer steelhead into the North Santiam River and the South Santiam River basins in the period before the Court considers and deems lawful any subsequent BiOp or subsequent approval of any hatchery summer steelhead HGMP;
7. Award Plaintiffs reasonable costs, expenses, and attorneys' fees;
8. Grant such other relief as Plaintiffs may pray for or the Court deems just and proper.

Date: May 18, 2021.

Respectfully submitted,

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